

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Administrative Penalty  
Order Issued to Carl Bowman and  
Bowman Construction Co., Inc.

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION**

This matter came on for a hearing before Administrative Law Judge Manuel J. Cervantes pursuant to a Notice and Order for Hearing and Prehearing Conference filed on June 26, 2008. The matter came on for hearing on November 3, 2008, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota. The Department served and filed its proposed Findings of Fact, Conclusions and Recommendation on December 1, 2008. The Respondents Carl Bowman and Bowman Construction Co., Inc., served and filed their proposed Findings of Fact, Conclusions, and Recommendation on December 4, 2008. The record closed, pursuant to agreement of the parties, on December 16, 2008 upon submission of the parties' respective replies to the proposed Recommendations.

Wendy Willson Legge, Construction Codes and Licensing attorney, Department of Labor and Industry, 443 Lafayette Road, St. Paul, Minnesota, appeared on behalf of the Minnesota Department of Labor and Industry (Department).

Steven A. Nelson, Attorney, 210 Fourth Avenue, International Falls, Minnesota, appeared on behalf of Carl Bowman and Bowman Construction Co., Inc. (hereinafter jointly referred to as "Respondents").

**STATEMENT OF ISSUES**

1. Did the Respondents violate Minn. Stat. § 326.40, subd. 1 (2006)<sup>1</sup>, by performing plumbing in International Falls without a license?
2. Did the Respondents violate Minn. Stat. § 326.40, subd. 2 (2006)<sup>2</sup>, by contracting for plumbing work without first filing with the Department a \$25,000 plumbing code compliance bond?
3. Did the Respondents violate Minn. R. 4715.3130 (2007) by installing the building sewer and water service prior to plans being submitted to and approved by the Department?

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<sup>1</sup> Renumbered "Minn.Stat. 326B.46, subd. 1 (2008)."

<sup>2</sup> Renumbered "Minn.Stat. 326B.46, subd. 2 (2008)."

4. Did the Department properly issue an Administrative Penalty Order under Minn. Stat. §§ 144.99 and 144.991 (2006)?

5. Based on the factors set forth in Minn. Stat. § 144.991, subd. 1 (2006), is the amount of the penalty unreasonable?

6. Is the corrective order included in the Administrative Penalty Order reasonable?

Based on all the files, records and proceedings herein, and for the reasons set forth in the accompanying memorandum, the Administrative Law Judge makes the following:

### **FINDINGS OF FACT**

1. This contested case proceeding was initiated based upon the Respondents' appeal of an Administrative Penalty Order issued by the Department on February 27, 2008, alleging that the Respondents committed certain violations of the Minnesota plumbing laws in connection with work performed at a construction site for a future Dollar Tree Store in International Falls, Minnesota (hereinafter the "Dollar Tree site"). Carl Bowman (hereinafter "Bowman") is the chief executive officer, chief financial officer, vice president, and a shareholder of Bowman Construction Co., Inc. (hereinafter the "Company").<sup>3</sup>

2. The Company entered into two subcontracts with Nations Contracting, LLC (hereinafter "Nations") to perform work at the Dollar Tree site. One subcontract was for concrete work,<sup>4</sup> and another subcontract was for site work.<sup>5</sup> Bowman signed both subcontracts as the owner of the Company.<sup>6</sup> Bowman and other employees of the Company performed work at the Dollar Tree site pursuant to the two subcontracts. Bowman was personally on the site most of the time that work was performed under the subcontracts. Bowman was in charge of the work performed by Company employees under the subcontracts, and Bowman personally supervised the Company's employees in connection with their work. The Company paid its employees for the time that they worked on the Dollar Tree site. Bowman knew that the building to be constructed at the Dollar Tree site was a commercial building which would be open to the public.<sup>7</sup>

3. Bowman is not licensed and has never been licensed as a plumber in Minnesota. Bowman is not registered and has never been registered as a plumber's apprentice in Minnesota. Bowman does not hold and never has held a pipe laying card in Minnesota. During all times relevant to this matter, no employee of the Company

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<sup>3</sup> Testimony of Carl Bowman.

<sup>4</sup> Ex. 3.

<sup>5</sup> Ex. 4.

<sup>6</sup> Testimony of Darrol Hackney; test. of C. Bowman; Exs. 3 and 4.

<sup>7</sup> Test. of D. Hackney; test. of C. Bowman.

who performed work at the Dollar Tree site held any plumbing license, was registered as a plumber apprentice in Minnesota, or carried a Minnesota pipe laying card.<sup>8</sup>

4. The Company's subcontract for the site work included installation of approximately 120 linear feet of 1.5 inch copper water line from the city connection to the building, and approximately 110 linear feet of 6 inch sewer line from the city connection to the building, including cleanout.<sup>9</sup> The installation of these lines was shown on the construction plans for the site improvement, which were made part of the subcontract.<sup>10</sup>

5. The superintendent of construction for Nations, Darrol Hackney, was present at the Dollar Tree site every day that work was performed on the site by subcontractors. Before July 30, 2007, Hackney observed the Company's employees, supervised by Bowman, install the water line from the city connection near the property line to approximately five feet from the edge of the building. Similarly, before July 30, 2007, Hackney observed the Company's employees, supervised by Bowman, install the sewer line from the city connection near the property line to within five feet of the building.<sup>11</sup>

6. As Nations' superintendent for contracting, Hackney routinely takes photographs of work progress on construction projects. Hackney took photographs of work performed by the Company's employees in connection with the water and sewer lines on the Dollar Tree site.<sup>12</sup>

7. A photograph taken by Hackney on July 29, 2007, shows an employee of the Company using glue to install a sewer line fitting at the Dollar Tree site.<sup>13</sup> Bowman's testimony that he did not recognize this as one of his employees was not credible.

8. On or before July 30, 2007, Bowman informed Hackney that, if Hackney wanted the sewer and pipe lines brought inside the building from the point five feet outside of the building, the Company would need to hire a licensed plumber. Bowman, on behalf of the Company, and Hackney, on behalf of Nations, signed a supplemental agreement whereby the Company would hire a licensed plumber to install the water and sewer lines from the outside to the inside the of the building. Nations would pay for the work on a cost plus basis. This supplemental agreement was signed on July 30, 2007.<sup>14</sup>

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<sup>8</sup> Test. of C. Bowman.

<sup>9</sup> Ex. 4, p. 5 of 13.

<sup>10</sup> Test. of D. Hackney; Ex. 1, sheet 6 of 8; see Ex. 4, p. 5 of 13 (incorporating Ex. A-1), and p. 2 of 13 (Ex. A-1, which lists utility plan from sheet 6 of drawings).

<sup>11</sup> Test. of D. Hackney.

<sup>12</sup> Test. of D. Hackney; Ex. 8.

<sup>13</sup> Test. of D. Hackney; Ex. 8, p. 1; testimony of Brad Jensen.

<sup>14</sup> Test. of D. Hackney; Ex. 6.

9. After the supplemental agreement was signed, Hackney observed employees of the Company, under Bowman's supervision, install the water and sewer lines at the Dollar Tree site from the point five feet outside the building to a point inside the building.<sup>15</sup> Hackney signed off on the sewer and water work as complete on July 31, 2008.<sup>16</sup>

10. On August 6, 2007, Department inspector Brad Jensen (Jensen) happened upon the construction site, noticed that sewer and water lines had been installed, and noticed problems with this work. It was apparent to Jensen that the wrong sewer pipe had been used for the job.<sup>17</sup> Jensen also found out on August 6, 2007, that the sewer and water lines had been installed without submission of plans to the Department and without approval of plans by the Department. Portions of the sewer and water lines were buried at that time and had not been inspected as required. Plumbing plans were subsequently submitted to the Department on August 10, 2007 and September 4, 2007, and were approved.<sup>18</sup>

11. By invoice dated September 4, 2007, the Company billed Nations for the installation of the water and sewer lines on the Dollar Tree site.<sup>19</sup>

12. On September 25 and 26, 2007, Chuck Corrin (Corrin) was present at the Dollar Tree site. Corrin oversaw the uncovering and attempted repair of the various water and sewer lines for the purpose of preparing for another inspection by Jensen. These are the only two days that Hackney observed Corrin at the site.<sup>20</sup>

13. Corrin was licensed in Minnesota as a master plumber at all times relevant to this matter.<sup>21</sup>

14. On September 27, 2007, Jensen returned to the Dollar Tree site to witness an air pressure test on the water and sewer lines. The sewer line failed the test.<sup>22</sup>

15. Nations subsequently hired another plumbing contractor to fix the problems with the water and sewer lines and complete the work.<sup>23</sup>

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<sup>15</sup> Test. of D. Hackney.

<sup>16</sup> Test. of D. Hackney; Ex. 7, p. 2.

<sup>17</sup> Test. of B. Jensen.

<sup>18</sup> Test. of B. Jensen; Exs. 10 and 11.

<sup>19</sup> Ex. 2; test. of C. Bowman.

<sup>20</sup> Test. of D. Hackney; Ex. 9.

<sup>21</sup> Test. of B. Jensen.

<sup>22</sup> Test. of B. Jensen; Exs. 10, p. 3.

<sup>23</sup> See Ex. 10; test. of B. Jensen.

16. According to the last federal census in 2000, the population of International Falls was 6,703.<sup>24</sup> International Falls has a system of waterworks and sewerage, and is not a city of the first class.<sup>25</sup>

17. On February 27, 2008, the Department issued a Combination Administrative Penalty Order to the Respondents for violations of Minn. Stat. § 326.40, subds. 1 and 2 (2006) and Minn. R. 4715.3130 (2007). The order assessed a nonforgivable penalty of \$2,500 based on the serious nature of the violations, and a \$2,500 forgivable penalty. The order also specified that \$500 of the forgivable penalty would be forgiven if the Company provided documentation showing evidence of a plumbing bond. Also, \$2,000 of the forgivable penalty would be forgiven if the Respondents showed documentation of either a plumbing license or pipe layer training certificate for a Company employee(s).<sup>26</sup>

18. The Department based the penalty calculation on the Minnesota Department of Health Plan for the Use of Administrative Penalty, Cease and Desist Authority, and other division-wide enforcement tools, dated November 14, 2002 (hereinafter the “Plan”).<sup>27</sup>

19. The Plan defines the performance of work without a required license as a serious violation.<sup>28</sup>

20. The Plan defines the failure to file a bond when required by law as a serious violation.<sup>29</sup>

21. The Plan defines the failure to secure requisite plan approval prior to commencement of an activity as a serious violation.<sup>30</sup>

22. In determining the penalty amounts, the Department calculated a base penalty for each violation, using the matrix in the Plan which plots the degree of potential for harm of the violation against the degree of deviation from compliance of the violation.<sup>31</sup> In considering the potential for harm and deviation from compliance, the gravity of each violation was considered.

23. The Department considered the willfulness of the violations, whether there was a history of past violations, the number of current violations, whether there was any economic benefit gained from the violations, and whether there were any other factors

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<sup>24</sup> Ex. 13; testimony of Peterson.

<sup>25</sup> Test. of Peterson.

<sup>26</sup> Ex. 16.

<sup>27</sup> Test. of Peterson; Ex. 14.

<sup>28</sup> Ex. 15, p. 2; Ex. 14, p. 15; test. of Peterson.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Ex. 15, p. 3; Ex. 14, appendix c, p. 3.

as justice may require to be considered. After considering all of these factors, the Department determined not to change the base penalty amount.<sup>32</sup>

24. The base penalty amount was \$2,000 forgivable for the violation of Minn. Stat. § 326.40, subd. 1 (2006). The base penalty was \$500 forgivable and \$500 non-forgivable for the violation of Minn. Stat. § 326.40, subd. 2 (2006). The base penalty was \$2,000 non-forgivable for the violation of Minn. R. 4215.3130.<sup>33</sup>

25. The Department made \$500 penalty forgivable for violation of Minn. Stat. § 326.40, subd. 2 (2006), in order to encourage compliance with the bond filing requirement. The penalty was forgivable upon the filing of a plumbing bond.<sup>34</sup>

26. The Department made the \$2,000 penalty forgivable for the violation of Minn. Stat. § 326.40, subd. 1 (2006) because the Department was accepting pipe layer certification cards in lieu of a license for the installation of plumbing pipes outside.<sup>35</sup>

## CONCLUSIONS

1. The Minnesota Department of Health had initial authority to enforce the Minnesota Plumbing Code. By Department of Administration Reorganization Order No. 193, dated April 4, 2005, the Department of Health responsibilities in relation to plumbers were transferred to the Department of Labor and Industry. This transfer of authority was codified in Minn. Stat. § 326B.02, subd. 1 (2008), which became effective May 26, 2007.<sup>36</sup>

2. Included with this transfer of authority was the responsibility to enforce the plumbing code pursuant to the Health Enforcement Consolidation Act, Minn. Stat. §§ 144.99 to 144.993.

3. The Administrative Law Judge and the Commissioner of Labor and Industry have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50, 144.99, subd. 4, 144.991 (2006), and Minn. Stat. § 326B.02, subd. 1 (2008).

4. The Notice and Order for Hearing and Prehearing Conference is proper in all respects and the Department has complied with all substantive and procedural requirements of law and rule.

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<sup>32</sup> Ex. 15, p. 5; test. of Peterson.

<sup>33</sup> Ex. 15, p. 3; test. of Peterson.

<sup>34</sup> Test. of Peterson.

<sup>35</sup> Test. of Peterson. This exception to the licensing requirement became codified after the Respondents committed the violations but before the Department issued the Administrative Penalty Order. See 2007 Minn. Laws, Ch. 140, Art. 6, § 8, which (among other things) added the following sentence to section 326.40, subd. 1: "A license is not required for individuals performing building sewer or water service installation who have completed pipe laying training as prescribed by the Commissioner of Labor and Industry."

<sup>36</sup> See 2007 Minn. Laws, Ch. 140, Art. 2, § 3.

5. The statute applicable in July 2007 stated, in pertinent part:

In any city now or hereafter having 5,000 or more population, according to the last federal census, and having a system of waterworks or sewerage, no person, firm, or corporation shall engage in or work at the business of a master plumber or journeyman plumber unless licensed to do so by the state commissioner of health.<sup>37</sup>

6. The terms “master plumber” and “journeyman plumber” were defined as follow:

Subd. 7. **Journeyman Plumber.** A “journeyman plumber” is any person, other than a master plumber, who, as a principal occupation, is engaged as an employee of, or otherwise working under the direction of, a master plumber in the practical installation of plumbing.

Subd. 8. **Master Plumber.** A “master plumber” is any person skilled in the planning, superintending, and the practical installation of plumbing and otherwise lawfully qualified to contract for plumbing and installations and to conduct the business of plumbing and who is familiar with the laws and rules governing the same.<sup>38</sup>

7. Respondents’ installation of water and sewer lines at the Dollar Tree site was within the property lines of the premises, and included installation of piping to convey sewage to the legal point of disposal, which was the connection with the city.<sup>39</sup> The installation of the water and sewer lines as performed by Respondents at the Dollar Tree site was plumbing work, and therefore, was the business of a master or journeyman plumber for which a Minnesota plumbing license was required. By directing employees of the Company in the performance of this plumbing work, Bowman was performing the business of a master plumber.<sup>40</sup>

8. Respondents’ plumbing work at the Dollar Tree site without any Minnesota plumbing license violated Minn. Stat. § 326.40, subd. 1 (2006).

9. Minn. Stat. § 326.40, subd. 2 (2006) requires:

Any person contracting to do plumbing work must give bond to the state in the amount of \$25,000 for all work entered into within the state. The bond shall be for the benefit of persons injured or suffering financial loss by reason of failure to comply with the requirements of the plumbing code. A bond given to the state shall be filed with the Commissioner of Health and

<sup>37</sup> Minn. Stat. § 326.40, subd. 1 (2006).

<sup>38</sup> Minn. Stat. § 326.01, subds. 7 and 8 (2006).

<sup>39</sup> Test. of Peterson; test. of D. Hackney; Ex. 1, sheet 6 of 8.

<sup>40</sup> Minn. Stat. § 326.40, subd. 1, and § 326.01, subds. 7 and 8 (2006). See *also* Minn. R. 4715.0100, subps. 42, 76, and 81.

shall be in lieu of all other bonds to any political subdivision required for plumbing work. The bond shall be written by a corporate surety licensed to do business in the state.

10. Respondents contracted to perform plumbing work without giving to the State the bond required in violation of Minn. Stat. § 326.40, subd. 2 (2006).

11. Minn. R. 4715.3130, states in pertinent part:

Prior to the installation by any person, corporation, or public agency, of a system of plumbing that serves the public or that serves any considerable number of persons, or any plumbing system that shall affect the public health in any manner, complete plans and specifications together with any additional information that the commissioner of health may require, shall be submitted in duplicate and approved by the commissioner. . . . No constructions shall proceed except in accordance with approved plans.

12. The installation of water and sewer pipes at the Dollar Tree site by the Respondents was part of a plumbing system that would serve the public, that would serve a considerable number of persons, and that would affect the public health. Respondents installed these water and sewer lines before any plans or specifications had been submitted to the Department and before any approval of plans by the Department. Respondents, therefore, violated Minn. R. 4715.3130 (2007).

13. The Department reasonably determined that Respondents' violations of Minn. Stat. § 326.40, subd. 1 and 2 (2006) and Minn. R. 4715.3130 (2007) were serious within the meaning of Minn. Stat. § 144.99, subd. 4(a) (2006). In determining the penalty amount, the Department considered all factors required by Minn. Stat. § 144.991, subd. 1(a) (2006).

14. The ALJ may not recommend a change in the amount of the proposed penalty unless the ALJ determines that, based on the factors in Minn. Stat. § 144.991, subd. 1(a), the amount of the penalty is unreasonable.<sup>41</sup>

15. The amount of the penalty assessed by the Department in the Combination Administrative Penalty Order was not unreasonable.

16. The corrective action included in the Combination Administrative Penalty Order was reasonable.

17. These conclusions are reached for the reasons set forth in the memorandum below, which is incorporated by reference in these conclusions.

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<sup>41</sup> Minn. Stat. § 144.991, subd. 5(c) (2006).



18. The Combination Administrative Penalty Order is proper in all respects. In issuing the Combination Administrative Penalty Order, the Department complied with all substantive and procedural requirements of law.

Based upon these conclusions, and for the reasons explained in the accompanying memorandum, the ALJ makes the following:

### **RECOMMENDATION**

**IT IS RECOMMENDED** that the Commissioner of the Department of Labor and Industry affirm the Combination Administrative Penalty Order in all respects.

Dated: December 24, 2008

s/Manuel J. Cervantes  
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MANUEL J. CERVANTES  
Administrative Law Judge

Reported: Digitally recorded; no transcript prepared.

### **NOTICE**

This report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Labor and Industry will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Steve Sviggum, Commissioner, Minnesota Department of Labor and Industry, 443 Lafayette Road N., St. Paul, MN 55155, or call the Department at (651) 284-5005, to learn about the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

## **MEMORANDUM**

The ALJ has carefully considered the documentary evidence, photographs, and the credibility of the witnesses. Simply put, if the ALJ accepts the testimony of Mr. Bowman that neither he or his men performed any work that could be construed as plumbing work, then, the Company prevails; the Company would not be required to have any form of plumbing license, would not be required to post a plumbing bond nor be required to submit proposed plumbing work plans to the State of Minnesota. If, on the other hand, the ALJ believes the witnesses called by the Department, the ALJ must conclude the Company violated Minnesota law and rule. The documentary evidence submitted by both parties, the testimony of the Department's witnesses, and the Exhibit 8 photographs lead the ALJ to conclude that the Company did perform plumbing work at the Dollar Tree site and violated Minnesota plumbing law and rule. Moreover, the ALJ concludes that the monetary penalty and corrective order are appropriate and reasonable.

### **PERFORMING PLUMBING WORK WITHOUT A LICENSE**

It is undisputed that the installation of the water and sewer lines at the Dollar Tree site was plumbing work for which a license was required. The operational definitions require a journeyman to work under the direction of a master plumber in the practical installation of plumbing. In comparison, a master plumber plans and manages the work of the journeyman and/or personally engages in the practical installation of plumbing. The definitions in the plumbing code make clear that the installation of the water and sewer lines at the Dollar Tree site was in fact the installation of plumbing.<sup>42</sup>

The underlying factual question is: who installed the water and sewer lines within the property lines of the Dollar Tree site? The Department asserts that this plumbing work was performed by Bowman and Company, by its employees. The Respondents contend that they only performed ditch digging and back filling, and that all the plumbing installations were performed by Chuck Corrin, a master plumber.

The ALJ finds the documentary, photographs, and testimonial evidence supporting the Department's position to be more credible. The plumbing installations can be broken down into two phases: (1) who installed the water and sewer lines from the mains at the property line to a point approximately five feet outside the building? (2) Who brought the water and sewer lines inside where the building would be, from the point five feet outside the building? On the first question, the evidence is overwhelming that the Company contracted to perform this water and sewer installation and that the Company, through its employees and at the direction of Bowman, installed the water

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<sup>42</sup> Definitions of "plumbing", "plumbing system", and "drainage system" are in the plumbing code. See Minn. Rule 4715.0100, subps. 76, 81, and 42 (2007).

and sewer lines from the property line to a point five feet outside the building. As to the second question, although Bowman represented that the Company would hire a licensed plumber to bring the lines inside the building, the weight of the evidence shows that the Company's employees must have performed at least some of this plumbing work. In either case, any performance of plumbing work by the Company without a license constitutes a violation of the Minnesota plumbing statute and rules.

It is clear to the ALJ that the exhibits show that the Company contracted, under the original site contract, to install the water and sewer lines from the city connection up to the building, but not inside. The original construction plan shows the installation of the water and sewer line from the property line up to the building, and states: "The City of International Falls will construct the sanitary sewer and water service from the mains to the property line. The contractor will be responsible only for installation from the property line to the building."<sup>43</sup> This is consistent with the Company's contract for site work, which includes the following work to be performed by the Company: "Trench/backfill/patch approximately 120LF of 1.5 inch water line from city to building, trench/backfill/patch approximately 110LF of 6 inch sewer line from city to building, including clean up."<sup>44</sup>

Respondents claim that the contract did not include any water or sewer pipe installation, but only preparing the ditches for the pipes. Respondents claim that all pipe installation was instead included in the supplemental agreement signed on July 30, 2007 (Exhibit 6). This supplemental agreement states in pertinent part: "We are proceeding to do extra work that you have directed us to do consisting of the following items: . . . 2) Hire a licensed plumber to install water and sewer line inside the building."

Respondents' position is not credible, for the following reasons:

1. The supplemental agreement was not signed until July 30, 2007. Hackney took a photograph of one of the Company's employees working on the installation of the sewer line on July 29, 2007.<sup>45</sup> It is undisputed that this employee was gluing the sewer line. This conduct cannot be construed as merely preparing a ditch. Since the Company's employee was installing a sewer line before July 30, 2007, this supports the Department's position that the initial installation of the sewer line from the property line to a point five feet from the building was covered under the original site work contract.

2. The original site work subcontract and construction plan only included water and sewer line installation "to" the building. The additional agreement, on the other hand, refers to installation "inside the building." Without concluding that Corrin actually did the plumbing work, Corrin's letter dated August 31, 2008 tends to corroborate this as well. He states:

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<sup>43</sup> Ex. 1, Sheet 6 of 8, Note 1.

<sup>44</sup> Ex.4, p. 5 of 13.

<sup>45</sup> See Ex. 8, p. 1; test. of D. Hackney.

I (Chuck Corrin) told the inspector that all we were going to do was water and sewer. We ran the 35# 6" sewer into the building and so the other contractor could continue with the footings. We also ran the 1 1/4 type K copper into the building then stopped.<sup>46</sup>

This is consistent with the Department's position that the supplemental agreement only covered the work from the point five feet outside the building to the inside of the building.

3.The site work subcontract must have covered installation of water and sewer lines, or else the subcontract would have included the words "by others." The site work contract included the words "by others" in connection with the installation of the other utilities, for example, the electrical conduit, the gas line, the telephone wire, and the cable TV. Similarly, the site work contract stated "including cleanout" in connection with the installation of the sewer line.<sup>47</sup> If the contracted work had been merely preparation of the ditch, the words "including cleanout" would not have been needed or used.

4.Bowman testified that Corrin performed all of the plumbing work in ten hours, without any help, and invoiced the Company for those ten hours of work.<sup>48</sup> This is not credible. It is not physically possible for an individual to uncoil 1 1/2" copper tubing alone.<sup>49</sup> An average plumber could not have done all the plumbing work involved in phases one and two in that time frame by himself. It would have taken two average plumbers ten hours each to perform the work together.<sup>50</sup>

5.Although the Company's invoice for work at the Dollar Tree site includes six hours of Corrin's labor, it also includes as "services" the installation of a hardened 30 linear feet of sewer line and 130 linear feet of water line. These are separate listings for "services" in the invoice.<sup>51</sup>

The Department raised an issue of the authenticity of Exhibit B at the hearing. Accepting that Exhibit B was a letter from Corrin, it contradicts Bowman's testimony. Exhibit B repeatedly uses the word "we." Bowman testified that Corrin did the work by himself. Exhibit B clearly recognizes that it took more than one person to do the plumbing work at the Dollar Tree site. Accordingly, even if Corrin performed a portion of the plumbing work, a reasonable inference from all the evidence is that the rest of the work was performed by Company employees under the supervision of Bowman.

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<sup>46</sup> Ex. B, paragraph 3; also see test. of B. Jensen, who recalled this conversation.

<sup>47</sup> See Ex. 4, p. 5 of 13.

<sup>48</sup> Test. of C. Bowman; Ex. C.

<sup>49</sup> Test. of B. Jensen.

<sup>50</sup> Test. of B. Jensen.

<sup>51</sup> See Ex. 2.

## **CONTRACTING FOR PLUMBING WORK WITHOUT A BOND**

The Department has shown that the Company and Bowman contracted to do plumbing work at the Dollar Tree site. Neither the Company nor Bowman had on file with the Department any plumbing bond, therefore, Respondents violated Minn. Stat. § 326.40, subd. 2 (2006).

## **INSTALLING PLUMBING WITHOUT PRIOR PLAN REVIEW AND APPROVAL**

It is undisputed that plumbing work was performed at the Dollar Tree site prior to the submission of plans and specifications. Respondents argue that it was not their responsibility to submit plans and obtain approval. Respondents are in error. Respondents were responsible to ensure that plans had been submitted and approved before Respondents installed the water and sewer lines, regardless of whom else might also be required to do so. Under the rule, it is the *installation* of the plumbing without plan approval that is the violation. Accordingly, since Respondents installed the plumbing, they violated the rule. Under an appropriate reading of the rule, it is not unreasonable for the Department to penalize the “installer” when plumbing has been installed without prior plan approval.<sup>52</sup>

## **PENALTY AND CORRECTIVE ACTION**

The assessment of the penalty and corrective action were consistent with the Plan. The Department reasonably determined that the three violations were serious. Accordingly, the Department could have made all three penalties nonforgivable. The Department instead, chose to make half the penalty forgivable. The penalty amounts, which were consistent with the penalty matrix in the Plan, were arrived at after consideration of all the statutory factors. The ALJ, therefore, cannot say that the penalty is unreasonable. The corrective action is also reasonable, especially since the Department could legally have made the entire penalty nonforgivable.

**M. J. C.**

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<sup>52</sup> See test. of Peterson.